Supreme Court, U.S.
FILED

02 965 DEC 20 2002

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No.

IN THE

Supreme Court of the United States

RAYMOND J. MCCLENDON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Whether, in the wake of cases such as *New York v. United States*, 505 U.S. 144 (1992), and *United States v. Lopez*, 504 U.S. 549 (1995), § 1346, as interpreted and applied, violates the concept of dual federalism thereby rendering the statute unconstitutional.

2. Whether the Eleventh Circuit's interpretation and application of the criminal prohibition against schemes to defraud victims of "the intangible right of honest services," under 18 U.S.C § 1346 is void for vagueness as applied to petitioner because it fails to pass the two part vagueness test endorsed by this Court in *Kolender v. Lawson*, 461 U.S. 352 (1983). Specifically, by not requiring that the government show a source in state law for a "right to honest services," does § 1346 fail to provide both sufficient notice to potential defendant's and adequate boundaries on the limits of prosecutorial discretion?

PARTIES TO THE PROCEEDINGS

Petitioner is Raymond J. McClendon. He was a defendant in the district court and an appellant in the court of appeals. Theresa A. Stanford was also a defendant and appellant in the proceedings below.

Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Raymond J.McClendon, by and through his attorney, L. Tyrone Holt of Ireland, Stapleton, Pryor & Pascoe, P.C., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 4a) was not published, nor was the Order denying appellant's Petition for Rehearing (App., *infra*, 1a). The order of the district court (App., *infra*, 7a) was also unpublished.

JURISDICTION

The district court entered its judgment on January 31, 2001. The court of appeals' judgment was entered on June 14, 2002. A timely petition for rehearing was denied on August 20, 2002. On November 12, 2002, Justice Kennedy extended the time within which to file a petition for a writ of certiorari up to and including December 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V (reproduced in its entirety at App., *infra*, 10a).

The Tenth Amendment states that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X.

The relevant statutory provisions, including 18 U.S.C. §§ 1341, 1346 and 2 (2001), are reproduced at App., *infra*, 11a.

STATEMENT

This case raises important, recurring questions relating to the interpretation and application of 18 U.S.C. § 1346. Specifically, it presents the question of whether § 1346 violates the principle of dual federalism articulated and emphasized by this Court in cases such as *New York v. United States*, *supra*, and *United States v. Lopez*, *supra*. The Postal Clause of the Constitution, U.S. CONST. art. 1 §8, cl. 7, gives Congress the power to "Establish Post Offices and Post Roads." It does not give Congress the power to require "honest services" from state and local officials. As a result, 18 U.S.C. § 1346 is unconstitutional as a violation of the Tenth Amendment and the states' authority to criminalize behavior of its own employees.

Additionally, § 1346 raises the question of whether it provides sufficient notice to citizens of what conduct may subject them to federal prosecution, and, more importantly, whether § 1346 places adequate limits on federal prosecutorial discretion.

Section 1346 was enacted by Congress in 1988 in response to this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), which held that the Mail Fraud Statute, 18 U.S.C. § 1341, reached only those schemes intended to deprive victims of money or property. Prior to *McNally*, courts had interpreted the phrase "any scheme or artifice to

defraud," in the Mail Fraud Statute to include those situations in which victims were deprived of "honest services." *See e.g., United States v. Clapps*, 732 F.2d 1148, 1152-53 (3rd Cir. 1984); *United States v. States*, 488 F.2d 761, 764-67 (8th Cir. 1973).

In response to this Court's demand that Congress "speak more clearly than it has," *McNally*, 483 U.S. at 360, Congress enacted § 1346 defining "any scheme or artifice to defraud," as including "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (2002). The result has not been the clarity demanded by this Court, but rather has been to leave courts with the legislative task of defining "honest services," which they have proceeded to do on a case-by-case, circuit-by-circuit basis.

The enactment of § 1346 has engendered widespread conflict and confusion in the lower courts. For example, the Fifth Circuit has held that the scope of the "honest services" required by § 1346 must be defined as duties set out in state law. *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997). Other circuits have held that such a basis for the duty of "honest services" need not be found in state law. *United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997). *United States v. Sawyer*, 239 F.3d 31, 40 (1st Cir. 2001). The Second Circuit has recently held the "honest services" provision to be unconstitutionally vague as applied in certain situations. *United States v. Handakas*, 286 F.3d 92, 106, 107 (2nd Cir. 2002).

As the Fifth Circuit so accurately stated, § 1346 is "a truly extraordinary statute, in which the substantive force of the statute varies in each judicial circuit." *Brumley*, 116 F.3d at 743 n.6 (Jolly, J., dissenting). As a result of the extraordinary nature of § 1346, citizens are left with insufficient notice of prohibited behavior and federal prosecutors have

limitless discretion to prosecute behavior that may or may not be illegal.

A. The Trial Court's Decision

On August 8, 2000, following a jury trial in the Unites States District Court for the Northern District of Georgia, Petitioner, Raymond J. McClendon, was convicted of twenty-eight counts of aiding and abetting co-defendant, Theresa Stanford, in depriving the State of Georgia and its citizens of their right to "honest services" and of their money and property through the use of the United States mails in violation of 18 U.S.C. §§ 1341, 1346 and 2.

Petitioner was Vice Chairman and Chief Operating Officer of Pryor, McClendon, Counts & Co., Inc., (PMC), a New York corporation recognized as a registered broker-dealer under federal securities law. PMC maintained its principle place of business in Philadelphia, Pennsylvania, and had offices in other cities including Atlanta, Georgia and New York. Petitioner ran the Atlanta office.

Co-defendant Stanford was employed as the City of Atlanta's Investment Officer from November 1983 until June of 1994. As part of her duties, Ms. Stanford had the discretion to purchase and sell the City's fixed income securities.[1]

In July 1997, Petitioner submitted a proposal on behalf of PMC, to Ms. Stanford, suggesting an

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[1] The fixed income securities involved in this case are known as "STRIPS," or "Separate Trading of Registered Interest and Principal Securities." STRIPS are government treasury bonds that entitle the holder of a bond to a lump sum payment on the maturity date instead of providing the holder with interest payments in the interim. (R22 270, Tr. 1001-2).

investment trading strategy designed to lock in yield by doing "yield pick ups and swaps." Depending on the particular fund, the strategy was designed to lock in long term STRIPS prices to achieve informal defeasance or debt retirement. The goal of Petitioner's proposed trading strategy was to enhance the value of the liquidity of Atlanta's portfolio of fixed income securities. (R25 273, Tr. 1587).

Petitioner's co-defendant was charged with giving favorable treatment to PMC over other broker-dealers in exchange for financial benefits PMC provided her and her husband, Charles Stanford. The prosecution alleged that Petitioner aided and abetted the co-defendant in devising a scheme and artifice to defraud the City and its citizens of money, property and Ms. Stanford's "honest services."

The prosecution alleged that Petitioner and Ms. Stanford caused the scheme to defraud to be carried out by causing Prudential Securities, Inc. to mail client confirmations of the STRIPS trades to the City of Atlanta which PMC made during the six month period beginning January 25, 1994 through May 2, 1994.

In support of the charges against Petitioner and Ms. Stanford, the prosecution alleged that PMC loaned $30,000 to Charles Stanford, which was routed through a third party, Mr. Richard Tynes. In addition, the indictment points to the fact that PMC subcontracted work which it received from the Resolution Trust Corporation (RTC) to Montclaire Financial Group, Inc., a corporation organized by Charles Stanford. PMC was Montclaire's biggest client and from work subcontracted from PMC, Montclaire earned approximately $320,000 over three years.

Additionally, Ms. Stanford was charged with arranging for preferential treatment of PMC over other brokerage firms. Specifically, the indictment alleges

that Ms. Stanford directed the majority of trades of more than twenty million dollars to PMC. As part of this preferential treatment, the government alleges that Ms. Stanford mailed other broker-dealers Swap Reports,[2] which excluded the identity of STRIPS that the City held in its portfolio, while providing internal reports to PMC which included identification of the STRIPS.

According to the prosecution, Ms. Stanford had a duty to disclose these relationships between and among herself, her husband, PMC and the Petitioner. It is this failure to disclose that serves as the basis for the alleged violation of § 1346 by both Petitioner, as an aider and abetter pursuant to 18 U.S.C. 2, and Ms. Stanford.

Over objections of defense counsel at trial, the district court did not require the prosecution to identify a basis in state or local law for this duty to disclose, and allowed the government to proceed on a theory that such duty exists independent of state and local law. (R27 275, Tr. 1850, 1863-64). As a result, Petitioner was convicted of violating § 1346 and depriving the City of Atlanta and its citizens of "honest services" from the City's Investment Officer.

At the sentencing hearing, the district court sentenced Petitioner to eighty months' imprisonment, to be followed by three years' supervised release and 250 hours of community service, fined $1,400, and ordered to pay restitution to the State of Georgia in the amount of $1.5 million.

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[2] A "Swap Report" is a monthly report that includes the City's security holdings.

B. The Court of Appeal's Decision

The Court of Appeals for the Eleventh Circuit affirmed Petitioner's conviction, and the Petition for Rehearing was denied. Petitioner is currently in the custody of the Bureau of Prisons at the Federal Correctional Facility at Jesup, Georgia, where he has been since March 13, 2001.

In deciding Petitioner's appeal, the Eleventh Circuit affirmed Petitioner's conviction in a *per curiam* memorandum opinion, giving little, if any, reasoning, to support its decision. In rendering this affirmation without explanation, the Eleventh Circuit, like so many circuit courts before it, relieved itself of the daunting task of addressing the constitutional concerns presented by the various circuits' interpretations and applications of 18 U.S.C. § 1346.

Review of this case would allow this Court to resolve widespread uncertainty over the meaning of "honest services" as it appears in § 1346, thereby providing citizens with fair and adequate notice, and prosecutors with limits to the degree of discretion they may exercise when prosecuting mail fraud cases.

REASONS FOR GRANTING THE PETITION

The decision below adds to the circuit conflict regarding how to interpret § 1346 of the Mail Fraud Statute and imposes the question of whether Congress had the power to enact § 1346 in light of this Court's decision in *United v. Lopez*, 514 U.S. 549 (1996).

As previously discussed, § 1346 was enacted by Congress in 1988 following this Court's ruling in *McNally*, 483 U.S. 350, in 1987. In *McNally*, this Court held that "any scheme or artifice to defraud" as referred to in § 1341 of the Mail Fraud Statute did not

encompass a prohibition of the deprivation of honest services, and demanded more clarity from Congress before they would hold otherwise. *McNally*, 483 U.S. at 360. In response, Congress enacted § 1346 which specifically states that "the intangible right of honest services," is included in the definition of "any scheme or artifice to defraud." 18 U.S.C. § 1346 (2002).

The result of § 1346 has not been the clarity that the Court sought in *McNally*, but rather the result has been increased confusion. The phrase "honest services" invites a wide-range of judicial interpretations that will, no doubt, vary from circuit to circuit. The result is a statute that is unconstitutionally vague, depriving potential defendants of the due process right to notice, while giving federal prosecutors free reign in the realm of mail fraud prosecution.

Additionally, the enactment of § 1346, which invites federal judges, juries and prosecutors to define criminal acts by state officials, is unconstitutional as it is contrary to the Tenth Amendment. Section 1346 contradicts the concept of dual federalism, which has been expressed by this Court in recent years. *See e.g., Evans v. United States*, 504 U.S. 255 (1992); *New York v. United States*, 505 U.S. 144 (1992); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997).

Petitioner believes that an analogy may be drawn between Congress's attempt to broaden the scope of the Commerce Clause as discussed in *Lopez*, and its attempt to broaden the Postal Clause to expand the scope of the Mail Fraud Statute and allow federal prosecutors to police state and local officials.

I. Section 1346 is Unconstitutional Because Congress is Not Empowered by the Constitution to Require Honest Services from State and Local Officials

When Congress enacted § 1346, it added schemes to deprive another of the "intangible right to honest services" to the list of conduct punishable under the Mail Fraud Statute. Prior to the enactment, the statute, 18 U.S.C. § 1341, had already criminalized schemes to deprive another of money or property, provided that those schemes involved use of the United States Postal Service. In order to enact these statutes, Congress invoked its powers granted by the Postal Clause of the Constitution, which states: "The Congress shall have Power To Establish Post Offices and Post Roads." U.S. CONST. art. I, § 8, cl. 7.

As Justice Stevens recognized in his dissent in *McNally*, the power granted Congress by the Postal Clause is in place to protect the integrity of the United States Mails. *McNally*, 483 U.S. at 366 (Stevens, J., dissenting). However, at issue in the present case is not the integrity of the postal system, but rather the integrity of state and local governments.

Section 1346 calls upon federal judges and prosecutors to decide what conduct constitutes "honest services." Clearly, this statute raises powerful federalism concerns, which are best addressed by reference to previous, analogous decisions.

The first case that is useful in analyzing § 1346 as it affects federalism is *New York*. The thrust of the holding in *New York* seems to be an endorsement of dual federalism coupled with a more specific emphasis on the notion that "[s]tates are not mere political subdivisions of the United States." *Id.* In light if this recognition, there appears to be a contradiction between the assumption underlying § 1346, that the

federal government may create, impose and define laws applicable to the state officials, and the federalist implications of the Court's opinion. *Id.* at 162.

This Court's reasoning in *Lopez* is also a source of direction in analyzing § 1346 within the context of dual federalism. As the Court is aware, in *Lopez*, the Federal Gun-Free School Zones Act was struck down on the ground that it exceeded Congress's authority under the Commerce Clause. 514 U.S. at 500. In this case, Petitioner believes that Congress exceeded its authority under the Postal Clause when it passed the "honest services" provision of the Mail Fraud Statute. The Postal Clause allows Congress merely to "establish Post Offices and Post Roads." U.S. CONST. art. I, § 8, cl. 7. This power should not extend to the criminalization of certain conduct by state and local officials.

In the recent case of *Evans v. United States*, several justices of the Court dissented with the majority and recognized the need to limit federal prosecutions of state and local officials, particularly for engaging in acts amounting to government corruption. *Evans*, 504 U.S. at 290-94 (Thomas J., dissenting). This need for curtailment is clear in light of Justice O'Connor's focus on the importance of accountability in *New York*, in which she recognized as essential the ability of state citizens to determine which level of government is responsible for enforcing a particular law or regulation.

Further, it is not insignificant that *Lopez* involved a federal criminal statute. There, the court recognized that the very notion of a criminal federal statute cuts against that states "primary authority for defining and enforcing . . . criminal law." *Lopez*, 514 U.S. 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

This Court has not looked at § 1346 since the *Lopez* decision. This case gives the Court the chance to act on its recently voiced federalism concerns over the reach of mail fraud prosecutions. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("As we reiterated last Term, 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes."); *see also McNally*, 483 U.S. at 360 (noting that the absence of clear standards in the "honest services" doctrine implicates principles of federalism). Petitioner respectfully urges the Court to reconsider the appropriateness of limits on boot-strapping uses of the power granted by the Postal Clause.

II. Section 1346 is Unconstitutionally Vague so as to Deprive Citizens of Due Process of Law as Provided by the Fifth Amendment of the Constitution

A statute may be found unconstitutionally vague when it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. 352 (1983). "Arbitrary and discriminatory enforcement" means that the statute does not provide explicit standards for those who apply it.

When applying this two-part test, this Court has acknowledged that the degree of statutory vagueness that will be tolerated is dependant upon the nature of the statute at issue, noting that standards are stricter for enactments with criminal penalties because in the case of civil statutes, "the consequences of imprecision are qualitatively less severe." *Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

Where there is a vagueness challenge to a statute that does not involve First Amendment freedoms, the statute must be evaluated on an "as applied" basis. *See Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). In other words, the Court must look to the specific facts of a particular case in determine whether § 1346 is unconstitutionally vague as applied to Petitioner.

A. In Failing to Define "Honest Services" § 1346 Does Not Provide Sufficient Notice of Prohibited Conduct

The Due Process Clause of the Fifth Amendment requires the legislature to specify the elements of criminal offenses. Therefore, before a criminal offense can be punished, it must be shown that the defendant's case is plainly within a statute. *Fasulo v. United States*, 272 U.S. 620, 629 (1926). In other words, a penal statute must provide individuals with sufficient notice of the conduct that is prohibited. *See Kolender*, 461 U.S. at 357.

At least one circuit, the First Circuit, has held that due to the timing of the enactment of § 1346 shortly after *McNally*, citizens do have adequate notice that conduct that could be construed as depriving another of honest services subjects them to federal prosecution. *Sawyer*, 239 F.3d at 43. However, the Second Circuit has recently held § 1346 to be unconstitutionally vague as applied in that case. *United States v. Handakas*, 286 F.3d 92 (2nd Cir. 2002).

Other circuits, including the Fifth Circuit, recognize that § 1346 may not provide notice to all potential defendants. *Brumley*, 116 F.3d at 733 ("Because Congress was not faced with a uniform formulation of the precise contours of the doctrine, some defendants on the outer reaches of the statute

might be able to complain that they were not on notice that Congress criminalized their conduct when it revived the honest services doctrine.")

At least two circuits have noted that the terms "intangible right" and "honest services" which appear in § 1346 "cannot be found in Black's Law Dictionary, the United States Code, or (for that matter) any federal statute other than § 1346." *Id.* at 742 (Jolly, J., dissenting); *see also Handakas*, 286 F.3d at 104.

Further, a review of the legislative history behind § 1346 reveals that even Congress wrestled with the vagueness problem inherent in the language of the Statute.[3]

One particular problem with the honest services provision of the Mail Fraud Statute is that it is not limited to specified or traditional government crimes such as bribery and extortion. Essentially, § 1346 attempts to regulate government ethics. However, the term "honest services" is too vague for any reasonable person to know exactly what conduct is prohibited by this term.

B. Section 1346 Does Not Provide Adequate Limits on Prosecutorial Discretion in the Realm of Mail Fraud Prosecutions

The second vagueness inquiry is whether the statutory language is of such "a standardless sweep

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[3] Mr. Ronald Stroman, assistant counsel for the subcommittee stated, "If I read the Mail Fraud Statute...I would have to read the cases to specifically understand what the statute is attempting to get at. And my point is that if you say that what you are trying to do is create a new statute because it is more specific, quite frankly it is not any more [sic] specific." *Mail Fraud: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 7, at 48-49 (1988).

that it allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). Those statutes that delegate policy matters to law enforcement officials, be they policemen, lawyers or judges, fail to provide explicit standards sufficient to survive a constitutional challenge. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

In *McNally*, the Court decided that "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous, and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

It is important to note that *McNally* was decided in 1988, just after *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), when it seemed that the limits on federal regulations of states were few, and before the Court's mandate in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that Congress be clear about its intent to interfere with the prerogatives of state and local governments. In response to this message, Congress enacted § 1346, attempting, no doubt, to speak clearly, while exercising its right to regulate as set forth by the Court just one year earlier.

Unfortunately, in its attempt to comply with seemingly conflicting mandates, Congress failed to speak clearly. In enacting § 1346, Congress did not identify which forms of conduct are prohibited, nor did it explicitly refer to state or local governments. The resulting Mail Fraud Statute, of which § 1346 is a part, is an open-ended prohibition on dishonest government. This all encompassing interpretation invades and erodes the values promulgated by the very notion of federalism.

Circuit courts have acknowledged the federalism concerns presented by § 1346, and have described the statute as an attempt by the federal government to create "an ethical regime for state employees." *Brumley*, 116 F.3d at 734; *see also United States v. Margiotta*, 688 F.2d 108, 144 (2nd Cir. 1982) (Winter, J., dissenting) (stating that the honest services doctrine renders mail fraud "a catch-all...which has no use but misuse" and explaining that "'[w]hen the first corrupt prosecutor prosecutes a political enemy for mail fraud,' talk of honest services and 'good government will ring hollow indeed'").

These federal courts of appeal understand that to allow such overreaching by the federal government would be to endorse the creation of a class of federal common law crimes, and that is something that federal courts have repeatedly declined to do. *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999) (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

In *McNally*, this Court recognized that the concept of fraud embodied in the Mail Fraud Statute, is a broad concept that courts have been left to define. Since *McNally* and the enactment of § 1346, this problem has only gotten worse. Now, more than ever, the Mail Fraud Statute is being used to extend the power of federal prosecutors beyond criminal activity into the realm of the regulation of government ethics. Instead of allowing Congress to define the content of the statute, federal judges, juries and prosecutors have been left to that task. This need to define "honest services" not only raises Tenth Amendment concerns, but leaves the statute open to challenges based on unconstitutional vagueness as well.

C. Use of State Law as a Means to Reasonable Notice and a Limit to Prosecutorial Discretion

One way that courts have alleviated the uncertainties and prosecutorial discretion issues surrounding §1346 is to require that the § 1346 violation be based upon a violation of either state or local law. Currently, there is a circuit split over that issue that may be resolved by this Court.

1. The Circuits Are Split as to Whether a Violation of State Law is a Necessary Prerequisite to Federal Prosecution Under § 1346

In determining the scope of the honest services provision of the Mail Fraud Statute, there is a conflict among the circuits as to whether honest services required of a state or local official must be based in a state or local law.

Basing § 1346 violations on the violation of a state law would provide notice as to what conduct is prohibited and legitimately limit the discretion of federal prosecutors, judges and juries in mail fraud cases.

a. Section 1346 in the Fifth, Second, Third and Seventh Circuits

In *United States v. Brumley*, the Fifth Circuit held that "services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered." *Brumley*, 116 F.3d at 734. The Court reasoned that to hold otherwise would be to allow courts to assume the place of Congress by rewriting criminal laws. *Id.* at 737. While the Fifth Circuit is the only circuit that has explicitly held that the right to honest services must be

based in state law, several other circuits have indicated that they will impose such a requirement when and if the opportunity to do so presents itself.

In the Second Circuit case, *United States v. Margiotta*, 688 F.2d 108 (2nd Cir. 1982), the court recognized that the application of the federal Mail Fraud Statute to state and local officials, absent a controlling state law, raises federalism concerns. However, in that case, the court did not need to address those concerns because the duty owed by defendant was owed pursuant to state law. *Id.* at 124.

The Third Circuit observed this Court's warning in *McNally* that, "the prosecution of state public officials for honest services fraud raises federalism concerns about the appropriateness of the federal government's interference with the operation of state and local governments," 483 U.S. at 360, when it considered the case of *United States v. Panarella*, 277 F.3d 678 (3rd Cir. 2002). In that case, the Third Circuit recognized that a limiting principle is necessary to applying § 1346 in a manner that is consistent with the Constitution. *Id.* at 693-4.

In fact, the limiting principle suggested by the Third Circuit is state law. *See id.* at 693-4 ("We believe that state law offers a better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud"). The panel in *Panarella* explained that by requiring a violation of a state law, intrusion into state autonomy would be significantly muted because the conduct leading to federal prosecution would be the same conduct that the state had chosen to criminalize. *Id.* at 693-4.

Because a state law had been violated in *Panarella*, the court was not faced with the task of deciding whether a violation of state law was necessary

for nondisclosure to amount to federal honest services fraud. *Id.* at 693-4; *see also United States v. Antico*, 275 F.3d 245 (3rd Cir. 2001) (upholding a § 1346 conviction where a state law had been violated). Nonetheless, the Third Circuit has acknowledged that the existence of a violation of state law serves to mitigates the federalism concerns that arise from federal prosecutions of local public officials, thereby "avoid[ing] the parade of horribles envisioned by those who fear overly broad application of the federal mail and wire fraud statutes. *Panarella*, 277 F.3d at 699.

Lastly, the Seventh Circuit has acknowledged that requiring a state law violation could serve to allay the concerns about the vagueness of the statute, but has not yet had the opportunity to overturn its previously adopted anti-*Brumley* position. *Martin*, 195 F.3d at 967.

b. Section 1346 in the First and Eleventh Circuits

The First Circuit has held that the duty to disclose is a general fiduciary duty that a public official owes to the public, and therefore, § 1346 need not be subject to a limiting principle such as state law. *Sawyer*, 239 F.3d at 40. The Court in *Sawyer* explained that, "the incorporation of a state law violation in [a prosecution for mail fraud] may cause complication," and "the state violation must be correctly charged and adequately proven, or the proof on the federal charge fails as well." *Id.* at 43. Therefore, according to the First Circuit, requiring a state law is undesirable.

Likewise, the Eleventh Circuit has held that § 1346 is not unconstitutionally vague in the absence of a state law. *United States v. Waymer*, 55 F.3d 564, 568 (1st Cir. 1995). Later, in *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996), the Eleventh Circuit

expressly declined to follow the Fifth Circuit's holding in *Brumely*. *Id* at 1283.

2. State Law as a Means to Address Vagueness and Federalism Concerns Surrounding § 1346

Along with the Second, Fifth, Third and Seventh Circuits, several others have attempted to curtail the reach of § 1346, including those that have reinstated pre-*McNally* law. *See e.g., United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998) (recognizing "the risk that federal criminal liability could metastasize" if § 1346 were read too broadly); *Frost*, 125 F.3d. at 365-69 (noting breadth of literal terms of § 1346 and discussing various approaches to defining reach of statute); *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) (observing that "it would give [the court] great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing"); United States v. *Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (noting that Congress did not enact § 1346 "to create what amounts to a draconian personnel regulation"). It seems that requiring the violation of a state law as a necessary element of proving a violation of § 1346 would put to rest objections to the statute's use based on lack of notice and limitless prosecutorial discretion.

As raised in Part II.C.1, *supra*, examination of several cases from lower courts reveals that there is substantial support for this proposal. *See also United States v. Schermerhorn*, 713 F.Supp. 88, 91 n.4 (S.D.N.Y. 1989) (expressing "federalist concerns" that federal juries are being asked to make essentially "moral judgments about an official's behavior" and calling for limiting the statute's use to cases of conduct deemed illegal under state law); *United States v. ReBrook*, 837 F.Supp. 162, 170 (S.D.W.Va. 1993),

rev'd in part on other grounds, 58 F.3d 961 (4th Cir. 1995) (relying on the state ethics act to determine the state official's fiduciary obligations). These cases represent a *de facto* recognition by the federal courts of the need to define and limit § 1346, and the appropriateness of state law as the means by which to accomplish those goals. Vagueness objections have less force when federal courts rely upon state law.

Another advantage of this approach is that by requiring courts to rely on state law, this Court would be adhering to its own holdings in *McNally* and *Gregory* by sending the message to Congress that, if its intent in enacting § 1346 was to legislate in an area traditionally left to the states, it failed to make this intent "unmistakably clear in the language of the statute." *Brumley*, 116 F.3d at 737 (quoting *Gregory*, 501 U.S. at 460 (1991)). Regarding § 1346, the Fifth Circuit observed that this is "an intent that even infrared eyes cannot detect from this statute." *Id.* at 736. Because § 1346 does not specify use of a federal standard of honest services, it makes sense to presume that Congress did not intend to replace or displace state law.

Lastly, reliance on state law would also satisfy the rule of lenity which applies to this case. The rule of lenity requires that ambiguities in criminal statutes be resolved against the government. *Crandon v. United States*, 494 U.S. 152 (1990). Application of the rule is not discretionary. Rather, the Court must favor the narrower interpretation of a criminal statute when, as here, Congress has failed to speak to the contrary in language that is clear and definite. *Id.*

While Petitioner advocates the use of state law as a limiting principle, and as mechanism by which the Court could address the many vagueness challenges against § 1346, it is important to note that even with this limiting principle, Tenth Amendment

concerns remain in place. Requiring a state law would provide potential defendants with notice of what conduct is prohibited, and would place boundaries on federal prosecution under § 1346. However, such practice would invite the federal government to enforce state laws, and thereby infringe on powers traditionally reserved to the states.

The requirement imposed on Congress by this Court to speak more clearly was "for the benefit of the public, the average citizen...who must be forewarned and given notice that certain conduct may subject him to federal prosecution." *Brumley*, 116 F.3d at 745-46 (Jolly, J., dissenting). As the confusion among the circuits indicates, Congress has failed to satisfy that requirement.

What citizens such as Petitioner are left with are decisions that acknowledge that fraud is a broad concept that "is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." *United States v. Monostra*, 125 F.3d 183, 186 (3rd Cir. 1997). These decisions do little to address concerns that the federal fraud statutes give insufficient notice of what constitutes criminal behavior, and delegates to law enforcement impermissibly broad discretion to define the scope of criminal liability.

D. Section 1346 is Unconstitutionally Vague As Applied to Petitioner

As noted previously, Petitioner was convicted of violating § 1346 under 18 U.S.C. 2, as an aider and abettor to his co-defendant, Ms. Stanford. With respect to the honest services theory, the prosecution stated that Ms. Stanford had a duty to disclose the

relationship between her, her husband and Petitioner's business, PMC.

At trial, defendant Stanford introduced evidence to support the defense argument that she acted in accordance with all applicable state and local law. Accordingly, counsel for Petitioner requested, on more than one occasion, that the jury be instructed that a § 1346 charge could not stand absent the existence of a controlling state or local law. The Court repeatedly refused this request thereby allowing the jury to convict defendants of violating § 1346 even if they did not find a violation of state or local law. In other words, the jury was entitled to find that defendant Standford had an independent duty to act solely in the best interest of the citizens of the City of Atlanta, and that that duty was breached when she did not disclose the business relationship between her, her husband and Petitioner.

The defense grounded its request for the limiting instruction on the Fifth Circuit's decision in *Brumley*. 116 F.3d at 734. On appeal to the Eleventh Circuit, the government responded to Petitioner's argument by relying heavily on *Paradies*, in which the panel for the Eleventh Circuit declined to follow *Brumley* for no other reason than because it was in conflict with controlling precedent in the circuit. *Id.* at 1283. While Petitioner acknowledges the importance of the doctrine of *stare decisis*, such loyalty to precedent is misplaced when, as here, it amounts to a violation of a citizen's constitutional rights.

Petitioner did not have any reasonable notice that his acts could subject him to federal criminal prosecution. This is true not only because of the fact that his co-defendant's actions complied with state and local law, but also because of the confusion that exists among those federal jurisdictions in which

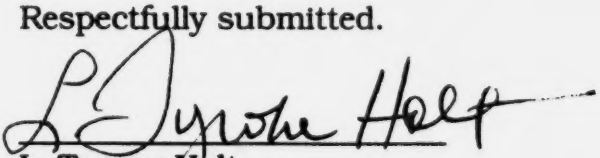
Petitioner's company is engaged in business e.g., New York, Pennsylvania and Georgia.

While Petitioner, as Vice Chairman and Chief Operating Officer of PMC, works out of Atlanta, in the Eleventh Circuit, his company is a New York corporation, which is part of the Second Circuit. Lastly, PMC's principle place of business is in Pennsylvania which is in the Third Circuit. As previously discussed, the interpretation and application of § 1346 in both the Second and Third Circuit differ greatly from that in the Eleventh Circuit, and in fact, lend support to Petitioners position that, as applied to him, § 1346 is unconstitutionally vague.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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APPENDICES

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United States Court of Appeals
For the Eleventh Circuit

No. 10-10616

District Court Docket No.
99-0462-CR-1-1

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

versus

RAYMOND J. MCCLENDON,
THERESA A. STANFORD,

Defendant – Appellants.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jun 14, 2002
THOMAS K. KAHN CLERK

Appeals from the United States District Court
from the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 14, 2002
For the Court: Thomas K. Kahn, Clerk
By: Eggleston, Nataki

ISSUED AS MANDATE
Aug 30 2002
U.S. COURT OF APPEALS
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10616-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND J. MCCLENDON,
THERESA A. STANFORD,

Defendants-Appellants.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 20 2002
THOMAS K. KAHN CLERK

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19___, ____ F.2d ____).

Before: WILSON, HILL and ALARCON,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

"s/Charles R. Wilson"
UNITED STATES CIRCUIT JUDGE

* Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10616

D.C. Docket No. 99-00462-CR-1-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND J. MCCLENDON,
THERESA A. STANFORD,

Defendants-Appellants.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 14, 2002
THOMAS K. KAHN
CLERK

Appeals from the United States District Court for the Northern District of Georgia

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(June 14, 2002)

Before, WILSON, HILL, and ALARCON, * Circuit Judges.

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* Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

Raymond J. McClendon and Theresa A. Stanford appeals from the judgments of conviction and sentence, following a trial by jury, of multiple counts of mail fraud and honest services fraud, in violation of 18 U.S.C. §§ 1341 and 1346. On appeal, they present the following issues:

1. That the district court erred in denying Stanford's motion to dismiss the indictment because the indictment was constitutionally defective in that it failed expressly to allege materiality of falsehood, which is an essential element of mail fraud.
2. That the district court erred in determining that the Government was not required to prove that Stanford violated duties imposed by state or municipal law in order to convict the appellants of honest services fraud under 18 U.S.C. § 1346.
3. That the district court abused its discretion in granting the Government a replacement preemptory challenge after sustaining McClendon's Batson objection to one of the jurors that the Government sought to exclude during jury selection.
4. That the district court abused its discretion in admitting the testimony of the Government's expert witness, Dr. Cohen, because it should have been excluded as unreliable pursuant to Rule 702 of the Federal Rules of Evidence.
5. That the district court abused its discretion in denying Stanford's motion to exclude the testimony of the Government's expert witnesses because the Government violated Rule 16 of the Federal Rules of Criminal Procedure by

not timely providing Stanford a summary of expert witness testimony that the Government intended to present at trial.

6. That the district court abused its discretion in admitting "other acts" evidence against McClendon under Rule 404(b) of the Federal Rules of Evidence.
7. That the district court's admitting into evidence the entire City of Atlanta ethics code constructively amended the indictment, in violation of Stanford's Fifth Amendment rights.
8. That the district court erred by not presenting to the jury the appellants' proposed theory of defense instructions.
9. That the district court erred in calculating the appellants' sentences under the United States Sentencing Guidelines.

After reviewing the record and giving serious consideration to these contentions, we find them to be without merit. The rulings of the district court are supported by the record and existing legal precedent.

McClendon's motion for release pending appeal is DENIED. The appellants' convictions and sentences are AFFIRMED.

ENTERED ON DOCKET
FEB 01 2001
L.D.T., CLERK
DEPUTY CLERK

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
JAN. 2001
LUTHER D. THOMAS, Clerk
By: "s/ Luther D. Thomas"
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

-vs- Case No. 1:99-CR-462-01-JTC

RAYMOND J. MCCLENDON Defendant's Attorney
Larry Thompson

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by jury on Counts 1 through 28 of the Indictment.

Accordingly, the defendant is adjudged guilty of such counts which involved the following offense:

Title & Section	Nature of Offense	Count No.
18 U.S.C. § 1341	Mail Fraud	1 through 28

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of $1,400.00 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 258-82-7056
Defendant's Date of Birth: February 27, 1952
Defendant's Mailing Address:
840 Agan Place
Atlanta, GA 30342

Date of Imposition of Sentence: January 22, 2001

Signed this the 30 day of JANUARY, 2001.

"s/ Jack T. Camp"
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

ATTEST: A TRUE COPY
CERTIFIED THIS
FEB 1 2001
Luther D. Thomas, Clerk
By: "s/Luther D. Thomas"
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHTY (80) MONTHS. This term consists of SIXTY (60) MONTHS on each of the Counts 1 through 27 to run concurrently, and TWENTY (20) MONTHS on Count 28 to run consecutively.

This Court hereby RECOMMENDS that the defendant be designated to the minimum security Federal Prison Camp at Jesup, Georgia.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons before 2:00 P.M. on February 22, 2001, or as later designated.

RETURN

I have executive this judgment as follows.

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHALL

By:_____
Deputy U.S. Marshal

United States Constitution – Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1341 – Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years or both.

18 U.S.C. § 1346 – Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 2 – Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2002, three (3) true and correct copies of the foregoing **PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT** were sent pursuant to Supreme Court Rules 29.4(a) and 29.5 via U.S. Mail, first class postage prepaid, to the following:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530 – 0001
Respondent's Counsel

L. Tyrone Holt

L. Tyrone Holt
Petitioner's Counsel of Record